

Belgium's Accordion Response to COVID-19

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A Year in Review

As Covid-19 started to make its way onto Belgian territory, the Belgian federal government found itself in the midst of political disorder and negotiations to form a government after the May 2019 elections. Up until March 2020, the competent authority to decide on Covid measures was a caretaker minority government (Regering Wilmès I). But, after the first big outburst of cases in Belgium, the government formation accelerated. Nine political parties made a deal to give the resigning minority government full authority to combat the virus and its economic and social ramifications by a motion of confidence (Regering Wilmès II).

On 12 March 2020, the Belgian federal government announced multiple [far-reaching measures](#) to flatten the curve of Covid-19 cases. The measures included mandatory closures of restaurants, bars and nightclubs as well as all non-essential shops during the weekend until the end of the month. Schools at all levels had to close as well. On 17 March, Belgium went into its first lockdown. This meant that non-essential shops had to close completely, working from home became the default mode of working and all non-essential movement or travel became prohibited. On 20 March, national borders were largely closed and most frontier-traffic was prevented. Although the government decided on an [exit-strategy](#), i.e. to loosen the restrictive measures in different stages, in early April, the measures were in force until the beginning of May. By July, most of the measures were loosened and some to an extreme extent (ex.: one's social bubble could now consist of 15 people per week, a measure [refuted by many experts](#)). Expectedly, infection rates rose again and by the end of July, the proclamation of new measures became urgent.

What followed was an accordion-motion of tightening and relaxing Covid measures up until October, when, after 652 days of minority governments, a new government was formed ([Regering De Croo](#)). Immediately after this change of government, measures were tightened again. From 16 October onwards, each individual was allowed to have one social contact, bars and restaurants closed again and a general night-time curfew from midnight to 5 a.m. was put in place for the entire country. The infection rate did not drop and more restrictions, like the closing of all non-essential shops, soon followed. A second full-fledged lockdown was in place until the end of November. In December, non-essential shops re-opened but shopping was limited to one person per family and had to be done within a half-hour time frame. The measures were not loosened during the holidays and are set to be re-evaluated mid-January.

Containing the Pandemic by Ministerial Decree

Unlike many other countries, Belgium did not proclaim a general state of emergency: the Belgian Constitution forbids the declaration of a formal state of emergency (Article 187). Instead, the federal Belgian government relied on the pre-existing legal process of [Special Powers Laws and Decrees](#). As foreseen by [Article 105](#) of the Belgian Constitution, the legislator can authorize the government to abrogate, complete, modify or replace legislative acts through royal decrees. These Special Powers Decrees must comply with strict conditions for their proper application: they can only be adopted under extraordinary circumstances, their material scope must be predetermined by the legislator, they need always be limited in time and they have to, eventually, be confirmed by a legislative act within a one-year time frame. In March, [two](#) of these Special Powers Laws granted the federal government (formally, the King) special powers for three months, allowing the minority government to combat the consequences and transmission of the virus through Special Power Resolutions. This resulted in an interesting balancing act for the minority government at the time, which had mere caretaker powers for matters unrelated to the pandemic, but was allotted broad powers to deal with pandemic related affairs. Special powers were also granted to the regional governments.

However, most of the restrictive measures taken in response to Covid-19 were taken by [Ministerial Decrees](#). These decrees are signed by one minister, authorized by the government, and are usually meant to cover [secondary and complementary measures](#). The Ministerial Decrees used to contain the spread of the virus supposedly find their legal basis in a [Law on Civil Security of 2007](#), assigning competence to the Minister of Home Affairs in case of imminent circumstances. However, both the nature of Ministerial Decrees and the Law of 2007 do not allow for this type of decision-making to implement longstanding measures that drastically limit citizens' freedoms. The legal basis has therefore been found inadequate by numerous [legal scholars](#), who have already called upon the government to create a proper legal framework for the restrictive measures taken in light of the pandemic. Without the presence of such a law that is adopted by Parliament and imposes limits on what type of restrictions the government can take, the measures taken by the Belgian federal government are currently unlawful and present a significant threat to the principles of the rule of law. It should be noted that, so far, the [Council of State](#) (composed of both an advisory body and jurisdictional body) has not seen any harm in the law that currently serves as a legal basis.

Judicial and Legislative Scrutiny

Parliamentary involvement has been remarkably low since the federal government has initiated its response to Covid-19. In dealing with the crisis, governmental decision-making has been the emphasis from the start. As already stated above, drastic restrictions on constitutional rights of Belgian citizens relied on decisions formally taken by one minister. [Constitutional experts](#) affirm that it is up to the legislator to decide on far-reaching constraints on constitutional rights in a public and open parliamentary debate, in order to ensure broad support for the measures

and transparency as to why certain measures are necessary. The Parliament can, however, still ask parliamentary questions to increase transparency and oversight was indeed increased in July with the creation of a special commission ([Covid-19 Commission](#)) mandated with the monitoring of the Belgian Covid-19 approach.

The [Council of State](#) usually has an advisory authority (legislation section) whenever the government proposes a law or a regulatory decision that falls within the competence of the Council. However, this advice can be [set aside for certain decisions](#), including public order and healthcare measures. The Council of State also has the competence to suspend or abolish administrative acts that are at odds with applicable legal provisions (administrative litigation section) and thus provides judicial oversight for the Special Powers Decrees taken in application of the legislation. So far, the Council of State has been rather cautious in their rulings on Covid-19 measures. [The Council of State](#) did not take issue with the contested legal basis when it decided on the closure of restaurants and bars as well as the curfew and thus accepted the Law of 2007 as a sufficient legal basis for these measures. It did, however, recently reject the general [prohibition of all religious services](#) for being a disproportionate restriction of the freedom of religion. The special powers legislation (not the Royal or Ministerial Decrees) can also be taken to the Constitutional Court to be assessed in light of the Belgian Constitution. Some [lower magistrates](#) have already deemed some of the Belgian Covid-19 measures unconstitutional and

Federal, Regional and Local Response and Coordination

Belgium is a federal state, composed of three communities and three regions, amounting to six distinct governments with an intricate division of competences, adding an extra challenge to the establishment of clear and unequivocal measures. The fragmented and complicated condition of Belgium's division of competences becomes unusually apparent when all focus is shifted to public health. Belgium counts no less than [nine ministers of Public Health](#), divided over the federal and federated governments, all with different, although overlapping, areas of competence, notably complicating the crisis management of this pandemic.

Since 12 March 2020, Belgium has been in a phase of national crisis management, meaning that the crisis is managed at national level. But, over the course of the year, the approach in response to the pandemic and the coordination between the various levels of government has shifted. At the start of the pandemic, the minority government implemented an [almost unitary approach](#) in setting up the Belgian Covid-19 response and took multiple measures for the entire country. However, this changed significantly when the latest government took over. Regional governments have since taken more liberty to tread on the terrain of [federal competences](#) and vice versa. This should not necessarily be considered a bad evolution. Crises of this kind need proper coordination between the different levels of government and responses should be fine-tuned to fit local and regional circumstances. This evidently requires flexibility from all sides. For instance, security and law enforcement is normally

an exclusive competence of the federal government. However, a large part of the coordination and communication regarding measures such as the curfew has now been left to the regional governments.

The coordination between the governments takes place in a [Consultative Committee](#) (composed of representatives of all governments), acting as the central point for coordination and collaboration between the federal government, the community-governments and the regional governments. Here, the federal Corona guidelines are discussed and afterwards refined by the regions and communities respectively. The guidelines themselves are developed in the [National Security Council](#) assisted by various experts.

At local level, provincial governors and mayors are also allowed to introduce specific and more severe measures for their province or municipality. Especially provincial governors, not elected by citizens but appointed by the government, have played an important role in introducing severe measures, such as [area-specific curfews](#).

Human Rights and Civil Liberties

Covid-19 measures are often at odds with various human rights and civil liberties, measures implemented by the Belgian Government are no exception. The government struggles to adequately balance the state's obligation to protect the right to life with other fundamental rights obligations. Introducing limitations to one fundamental right often has a negative effect on other rights, too. The imposed lockdown measures and the extreme limits on freedom of movement also hinder rights such as freedom of assembly, freedom of religion, the right to private life and the right to education, etc. In particular, the [curfew](#) received [resentment](#) for being a severe and unconstitutional measure that disproportionately hindered citizens' freedoms. In November, the municipality of Willebroek imposed a 10pm curfew for [security reasons](#) linked to troublemaking teenagers, proving that these measures, however well-intended in the context of Covid-19, can easily be misused.

The first and second lockdown have notably limited the right to free movement and other fundamental rights with multiple facilities being closed down and a strict limit on the number of people that can meet up (inside or outside the house) being introduced. Disrespecting any of the Covid measures can be fined with an administrative fine – a tool of Belgian law enforcement at the level of municipalities that has already been criticized for disregarding the separation of powers and legal certainty [in the past](#). Widening the scope of this type of fine to include the enforcement of Covid measures caused some [commotion](#), as this decision was taken by the minority government without involvement of the Parliament or the Council of State.

Besides the extraordinary impact on fundamental rights in general, the pandemic was especially hard on the rights of vulnerable groups. The Belgian Covid-19 measures took a high toll on, among others, the rights of elderly [people in homes](#), children with difficult home situations, handicapped persons, migrants and victims of domestic violence. UNIA, the Belgian Centre for Equal Opportunities, issued a [report](#)

in which it expressed criticism on how the Belgian government failed to anticipate and monitor the effect of the measures on these groups. The report discusses the impact of Covid-19 and Covid measures on Belgian citizens, it discusses which groups were impacted most and it makes recommendations to all responsible parliaments and governments to minimize this impact.

2021 Recommendations

One of the most significant issues of the Belgian Covid-19 response is the lack of a sufficient legal basis and parliamentary involvement. In January 2020, ten months after the start of the first lockdown, the government finally introduced a [‘Pandemiewet’](#) (Pandemic law). However, this is still a preliminary proposal and will not take effect before it is passed by Parliament. The exact content of the law is still unclear but the Minister of Home Affairs already clarified that the proposal contains a [non-exhaustive list of measures](#) that can be taken in case of public health emergencies. The law would serve as a legal basis for this and all following pandemics. Nevertheless, the law will still need to be accompanied by decrees and ordinances of the regional parliaments to also cover the measures that fall within the scope of their competences.

In terms of recommendations, the law should foresee a transparent, unequivocal framework for current and future public health emergencies, to ensure that severe restrictions to human and civil rights, incited by the government in times of emergency, will always have an explicit legal basis. Moreover, the law should introduce procedural safeguards for any extension made to the, currently, non-exhaustive list of measures.

Besides foreseeing a proper legal basis, the Belgian government should increase transparency and motivate to the general public why certain measures are being taken, what scientific advice they are based on and how the measures can be justified in light of factual circumstances. The government should disclose all necessary evidence on which it establishes its Covid-19 response and the proportionality of the measures should repeatedly be reassessed. It would also be helpful if the government remained decisive in its future communication and promulgation of new measures. Furthermore, a clear exit strategy should be developed and disclosed for all measures to ensure that none of them transform into persistent threats to the rule of law after this pandemic.

